SUPREME COURT, U. S.

Supreme Court of the United States

No. 755 October Term, 1967

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY,
Appellant

v.

STATE TAX COMMISSION,
Appellee

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

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BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

This brief as amicus curiae is submitted by the Commonwealth of Pennsylvania, sponsored by the Attorney General, William C. Sennett, in accordance with the authority provided in Rule 42 of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The Opinion of the Supreme Court of Massachusetts is reported at 229 N.E. 2d 245 (Mass. 1967). For a copy of the said Opinion and Concurring Opinion (Appendix, pp. 31-58).

JURISDICTION

The judgment of the Supreme Court of Massachusetts was entered on August 9, 1967 (Appendix, pp. 60-61), following the decision of that court sustaining the validity of the tax in question. The jurisdictional requisites are adequately set forth in the appeal filed by Appellant.

QUESTION PRESENTED

Are national banks Federal instrumentalities for the purposes of State Sales and Use Taxes in light of the development, both factual and judicial, of the relationship between national banks and the Federal Government?

STATEMENT OF INTEREST

The Pennsylvania Tax Act of 1963 for Education (Act of March 6, 1956 (1955), P. L. 1228, as amended, 72 P.S. 3403 et seq.), imposes an excise tax on the sale or use of tangible personal property within the Commonwealth of Pennsylvania. Section 203(i) of the Act excludes from the tax:

> "the sale at retail to, or use by the United States, this Commonwealth or its instrumentalities or political subdivisions of tangible personal property or services."

The Act further provides in Section 580(a), inter alia, that the Department of Revenue of the Commonwealth of Pennsylvania is authorized and empowered to prescribe, adopt, promulgate and enforce rules and regulations not inconsistent of the provisions of the Act. Pursuant to this statutory authority, the Department of Revenue, Commonwealth of Pennsylvania, with the approval of the Department of Justice of the Commonwealth of Pennsylvania, issued Regulation 206 which provides as follows:

> "[¶ 22,093] *Reg. 206. Sales to the United States Government or within areas subject to the jurisdiction of the federal government.—(Formerly Regulation TRa 205.) 1. Sales to the United States.*—Sales of tangible personal property or services to the Government of the United States are not subject to tax under the Act. Tax need not be collected on such

sales to a regular department (such as Defense, Interior, Agriculture, Post Office, Commerce) of the United States. See Regulation 200, Exemption Certificates.

"*.5 Federal Reserve Banks and their branch banks* are exempt from the payment of sales and use taxes under the Act. (See also Section 7 of the Federal Reserve Act.) However, commercial banks which are merely member banks of the Federal Reserve System are subject to sales and use tax. The only banks in Pennsylvania entitled to this exemption are the Federal Reserve Bank of Philadelphia, District No. 3, and the Pittsburgh Branch of the Federal Reserve Bank of Cleveland, District No. 4.

"*.10 2. Non-exempt agencies.*—National Banks, Federal Savings and Loan Associations, Federal Credit Unions, Joint Stock Land Banks, National Park Concessioners, The Atomic Energy Commission, Federal licensees such as Warehouses and Stockyards, and construction contractors engaged in the improvement of real estate (buildings, roads, structures, bridges) owned by an exempt Federal Agency, and similar corporations, companies, institutions or persons are not exempt.

"*.15 3. Sales within federal areas.*—Sales of tangible personal property by persons doing business in a federal area within the borders of this Commonwealth are taxable unless specifically exempt by some other regulation. Such vendor must collect the tax at the time of sale. * * *"

This, or a similar Regulation, has been in effect from the inception of the Pennsylvania Sales and Use Tax Act on March 6, 1956.

At the present time, there are three appeals pending in the Commonwealth Court of Dauphin County of the Commonwealth of Pennsylvania contesting the legality of Regulation 206 as it pertains to sales of tangible personal property to national banks. These cases are:

Commonwealth v. Northeastern National Bank and Trust Company, No. 126 Commonwealth Docket, 1967;

Commonwealth v. First National Bank of Peckville, No. 539 Commonwealth Docket, 1967; and

Commonwealth v. Hazleton National Bank, No. 529 Commonwealth Docket, 1967.

These cases all arise under a Petition for Refund of taxes voluntarily paid pursuant to the Act and the Regulation. Further, there are numerous cases pending at the various administrative levels as provided in the Act similarly raising the legality of Regulation 206. Thus, it has been the position of the Commonwealth of Pennsylvania since 1956 that national banks are not instrumentalities of the Federal Government and are subject to the provisions of the Pennsylvania Sales and Use Tax Act as any other vendor or vendee. Although such a pronouncement has not resulted in a major source of tax revenue, it has been a source of revenue relied on by the Commonwealth of Pennsylvania in providing services to its citizens and others. It is further to be noted that Section 553(d) of the Act provides that where an interpretation of the Act has been held to be erroneous by a court of competent juris-

diction, a five-year statute of limitations for refunds arises. Therefore, if it is concluded that national banks are federal instrumentalities, the Commonwealth of Pennsylvania will not only lose a source of tax revenues, but also be obligated to pay considerable refunds of taxes voluntarily paid for a five-year period.

The Commonwealth of Pennsylvania, as does many other jurisdictions, regulates state chartered banks. It is submitted that if it is determined that national banks are not subject to the Pennsylvania Sales and Use Tax, a distinctive unfair advantage will be granted to national banks as opposed to state banks. There is little doubt that these two types of financial institutions are in direct competition, and such an advantage would not only be unfair, but would in all probability necessitate the Commonwealth of Pennsylvania to rule that state banks would not be subject to the Pennsylvania Sales and Use Tax. Thus, an adverse holding to Pennsylvania's position would result in the further loss of state tax revenues.

The Commonwealth of Pennsylvania's interest in the instant matter is both pecuniary and regulatory, as well as an interest in a legal determination which has received varying conclusions from courts in the past. A definitive resolution of the problem by this Honorable Court will enable the Commonwealth of Pennsylvania, as well as other interested states, to chart a more precise course in future areas of state tax revenues and state bank regulation.

ARGUMENT

A. National Banks Are Not Federal Instrumentalities for State Sales and Use Tax Purposes

The opinion of the Massachusetts Supreme Court adequately describes the legislative and judicial history of national banks since their inception. The court's conclusion that although at one time national banks were instrumentalities of the Federal Government, that presently because of legislative and judicial review, such banks are no longer instrumentalities of the Federal Government, is a most proper and logical conclusion. The opinion of the Massachusetts court deals both with the sales tax aspect of the case and the use tax aspect of the case. Because of the nature of the Pennsylvania Act, the Commonwealth of Pennsylvania is primarily concerned with the issue raised under the use tax discussion. The Pennsylvania statute imposes tax both on the vendor and vendee and makes each equally and severally liable for the tax (Sections 201(a) and 201(b)). If a national bank is determined to be exempt from State taxation as a Federal instrumentality, those banks in Pennsylvania would be excluded from both the sales and use tax contained in the Pennsylvania statute. Therefore, for the purposes of the Commonwealth of Pennsylvania, it must be determined that national banks are no longer Federal instrumentalities in relation to state sales or use tax purposes (See Concurring Opinion, Appendix, p. 58).

The recent opinion by the Court of Appeals of New York State in *Liberty National Bank and Trust Company v. Buscaglia,* N.Y. 2d , opinion dated December 29, 1967, interpreted a statute similar to the Pennsylvania Act. It was the conclusion of a unanimous court that national banks were not granted immunity from state taxation as being instrumentalities of the Federal Government and, therefore, were subject to the New York sales and use tax. Again, the judicial and legislative history of national banks is detailed in the New York opinion. The New York court notes:

> "Since that date [1935] national banks perform no governmental functions whatever. They, like state banks, are privately owned and operated. Also like state banks, they are depositories for federal funds—indeed legislation forbids discrimination for that purpose between state and national banks which are members of the Federal Reserve System (12 U.S.C. §265). In addition, like any private enterprise engaging in activities affected with a public interest, they are subject to severe government regulation. This regulation is accomplished via membership in the Federal Reserve System—membership which is open to state banks upon a voluntary basis. (12 U.S.C. §321 [1964])"

Later in its opinion, as a factual matter, the New York court states:

> "The Bank concededly performs no governmental function whatever nor does it perform any direct service for the government different from any state bank which may be voluntarily associated with the Federal Reserve System. The bank is privately owned and operated primarily for the private benefit of its

owners. While it is subject to strict regulation for the public benefit, as any private enterprise whose operations are affected with a public interest, this regulation would hardly be sufficient to render the bank an instrumentality of the federal government so as to entitle it to the same immunity from taxation as the federal government itself."

In a concluding paragraph, the New York court precisely points to the issue and rationale of the instant dispute.

"We note in conclusion that the problems which face state and local governments in meeting their responsibilities in our complex society require the expenditure of vast amounts of money. The Liberty National Bank and Trust Company has not presented us with a single rational argument, aside from a string of cases which were relevant in another time and under different circumstances, why it should not, like any other business enterprise, contribute to the costs. And we perceive none."

The Commonwealth of Pennsylvania urges this Honorable Court to consider this statement in light of the present-day posture of state taxation.

Therefore, it has been the determination of two of the most distinguished state appellate courts that national banks no longer enjoy immunity from state taxation, unless permitted by the Congress. Each opinion was unanimous and extremely well reasoned and documented. It is submitted that this Honorable Court should examine both of these decisions with care, and although certainly not binding upon, this Honorable Court should indicate the thinking and rationale of the state courts in which the problem has arisen.

B. Section 548 of the United States Code Does Not Prohibit the Imposition of Sales or Use Taxes on National Banks by State Governments

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Assuming a national bank is not a Federal instrumentality for the purposes of this case, it has been contended that in any event Section 548 of Title 12 of the United States Code prohibits the imposition of the tax in question. The Commonwealth of Pennsylvania submits that the courts of New York and Massachusetts have adequately covered this point and have demonstrated that the provisions of Section 548 have no bearing on the instant controversy.

It is to be noted that Section 548 was last amended in 1926 and has remained in its present form since that year. In 1926 few state governments imposed a Sales and Use Tax Act, and such a tax had little effect on a particular state's budget. Today practically every state imposes a Sales and Use Tax, and such a source of revenue constitutes the major portion of many states' budgets. It is pointed out in *CCH, All-State Sales Tax Reporter,* Volume 1, page 511, as follows:

> "The movement for a national sales tax was again revived after World War II, but in the meantime a significant change had occurred in the nation's taxing pattern. In 1921, West Virginia passed a general sales tax; during the depression, nineteen states enacted similar statutes in two years. Today, sales taxes are collected in 42 states, plus the District of Columbia, and are, on a national basis, the most important single source of state revenues. In fiscal 1965, sales

taxes were the top state tax revenue source and the best source of revenue in 30 states."

This, therefore, is another factual change that supports the proposition that national banks may be taxed under a state Sales and Use Tax Act. Section 548 of the United States Code was never meant to prohibit a state from uniformly imposing a sales or use tax on national banks, in a uniform, nondiscriminatory manner. Such a tax is not a tax on the shares of a national bank, on its income, dividends or real estate. It is simply an excise tax on the sale or use of tangible personal property, not in any way prohibited or limited by Section 548.

CONCLUSION

It is respectfully submitted that national banks can no longer be considered a Federal instrumentality for the purposes of sales and use taxes imposed by the states. The imposition of such a nondiscriminatory tax upon both State and Federal banks is not prohibited by the Constitution or Section 548 of the United States Code. An area of state tax revenue should not be eliminated when any purpose or reason for such elimination has long since disappeared. The opinion and order of the Supreme Court of Massachusetts should be affirmed.

Respectfully submitted,

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